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Energy Insights

An Update from the Second Quarter of 2014

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In this edition of Seyfarth Shaw's Energy Insights Newsletter our Energy and Clean Technologies team covers important developments in Q2 2014 for the energy industry, including: 1) the DOE's draft loan guarantee solicitation for clean energy projects; 2) the EPA's proposed Clean Power Plan; 3) the U.S. Supreme Court's decision in Utility Air Regulatory Group v. EPA; and 4) the EEOC's recent crackdown on GINA violations and the implications for the energy industry.

DOE Clean Energy Program

On April 16, 2014, the Department of Energy (DOE) released a draft solicitation (to access the solicitation, click *here*) "to finance projects located in the United States that employ innovative and renewable or efficient energy technologies that avoid, reduce, or sequester greenhouse gases," committing up to $4 billion in loan guarantees for such projects and facilities. According to the solicitation, a project will be eligible for the Program if it: (1) uses (a) renewable energy systems; (b) efficient electrical generation, transmission, and distribution technologies; or (c) efficient end-use energy technologies; and (2) meets both the following requirements: (a) avoids, reduces, or sequesters anthropogenic emission of greenhouse gases; and (b) employs new or significantly improved technology as compared to technology in service. The DOE's new program will supplement its existing loan guarantees that have supported solar development and other clean energy projects.

The solicitation does not indicate when project applications will be due, but suggests that there will be multiple submission deadlines. The DOE will consider all eligible projects under the guarantee program, but identified five key areas: grid integration and storage; drop-in biofuels; waste-to-energy; enhancement of existing facilities; and energy efficiency improvements. Applications for loan guarantees for projects that could be fully financed on a long-term basis by commercial banks or others without a federal loan guarantee will be viewed unfavorably.

EPA "Clean Power Plan" to Drastically Cut Carbon Dioxide Emissions from Existing Power Plants

On June 2, 2014, the U.S. Environmental Protection Agency (EPA) released a proposed rule (to access the proposed rule, click *here*), known as the "Clean Power Plan," to drastically cut carbon dioxide emissions from existing power plants across the United States by the year 2030. The nearly 650 page Clean Power Plan (Plan) follows an earlier proposed rule limiting emissions from new power plants, first released on March 27, 2012, and updated on September 20, 2013. The Plan sets state-wide limits on carbon dioxide emissions from existing power plants, calling for a 30% reduction of carbon dioxide emissions below 2005 levels by the year 2030.

EPA uses authority granted under Section 111(d) of the Clean Air Act to hand responsibility for achieving the stated goals to individual state environmental agencies. The Plan lets each state determine how individual generating units will be regulated, allowing states to choose from a list of options to reduce carbon dioxide emissions across the entire energy sector including: creating or joining cap-and-trade programs (state and regional), increasing use of alternative fuels and renewable energy for generation, or imposition of strict energy efficiency measures within the state.

In the unlikely event EPA's Clean Power Plan goes into effect without challenge, each covered state must submit their implementation plans to EPA by June 30, 2016. For more information, see our previous *blog post*.

Supreme Court Strikes down EPA "Tailoring Rule"

On June 23, 2014 the U.S. Supreme Court, in *Utility Air Regulatory Group v. EPA*, issued its much anticipated decision regarding the EPA's "Tailoring Rule." (See our previous blog post, *here*). In 2010, following the Court's decision in *Massachusetts v. EPA*, the EPA issued a rule regulating greenhouse gas emissions from stationary sources, but "tailoring" the thresholds at which such regulations would apply, concluding that regulating sources at the Clean Air Act's statutory thresholds would be unmanageable and costly. In a partial victory for both sides, the Supreme Court held that the EPA lacked the authority to "tailor" its regulations in contravention of "the Clean Air Act's unambiguous numerical thresholds of 100 or 250 tons per year." Nevertheless, as Janet McCabe, Acting Assistant Administrator for the EPA, indicated, the EPA is "very pleased" with the decision because the Court upheld the EPA's overall authority to regulate greenhouse gases under the Clean Air Act. The Court allowed EPA to continue regulation of greenhouse gas emissions using Best Available Control Technology (BACT) for the so-called "anyway" sources (those that are required to obtain permits from EPA because they emit other covered pollutants "anyway"). The Court said, "EPA's decision to require BACT for greenhouse gases emitted by sources otherwise subject to PSD review is, as a general matter, a permissible interpretation of the statute . . . ."

The EEOC's Crackdown on Genetic Information Gathering and its Impact on the Energy Industry

In 2008, a bipartisan Congress passed the Genetic Information Nondiscrimination Act (GINA) to bar employers from using genetic information in employment decisions. One of GINA's key provisions is its prohibition against requesting or collecting certain kinds of genetic information from employees or job applicants. Since 2013, the EEOC has made GINA enforcement a priority. Two recent GINA settlements suggest that the Commission is just getting started. These settlements—and the EEOC's aggressive interpretation of GINA—should cause concern among employers in the energy industry, particularly those that conduct routine medical screenings on field workers or other employees. They also demonstrate that employers may become EEOC targets even for unintentional violations.

Many employers could be unwittingly violating GINA because it prohibits even passive collection of employees' or applicants' genetic information, regardless of the employer's intent to violate the law. This risk is particularly acute in sectors like the energy industry, where employers routinely require pre and post-hire medical screenings for field personnel and other employees. Moreover, because these practices are typically uniform (baked into medical checklists and questionnaires), they may invite EEOC scrutiny or even become fodder for class actions. Perhaps worst of all, to the extent that medical screenings are delegated to third-party vendors, these unlawful data-collection activities may be outside the employer's control.

Employers can avoid liability for collecting genetic information by including a "safe harbor" provision in their requests for health-related information. The safe-harbor language suggested by the EEOC warns the employee and/or healthcare provider collecting the information not to provide, request, or receive genetic information. If this type of warning is provided, any resulting acquisition of genetic information will be considered inadvertent, and therefore not in violation of GINA. Employers should also consider including GINA waivers in severance and settlement agreements. Even with such protections, however, employers should make efforts to ensure that their medical screenings and related requests for health-related information steer clear of genetic information that could implicate a GINA claim in the first place. For more information, click *here*.

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